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791-190—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 476

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1780, ET AL., PETITIONERS

v.

REYNOLDS ELECTRICAL & ENGINEERING CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE RESPONDENT IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the Eighth Judicial District Court, Clark County, Nevada (R. 463–510) is unreported.[2] The opinion of the Supreme Court of Nevada (Pet. App. 1–17) is reported at 401 P. 2d 60.

[1] Pursuant to a provision in the cost-plus contract between respondent and the government, the Department of Justice has represented the respondent in this litigation.

[2] "R" refers to the folios of Volume I of the record in the Supreme Court of Nevada, containing pleadings, orders, etc. "Tr." refers to the pages of Volumes II, III, and IV of that record, containing the transcript of testimony. "Ex" refers to the exhibits which were before the court below as part of the record on appeal. The entire record on appeal before the Supreme Court of Nevada has been filed in this Court.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on April 23, 1965. A timely petition for rehearing was denied on May 24, 1965 (Pet. App. 18). The petition for a writ of certiorari was filed on August 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the Supreme Court of Nevada correctly held that certain disputes over the interpretation of collective bargaining agreements were to be resolved under the arbitration provisions of those agreements rather than through judicial proceedings.

STATEMENT

Respondent, a government cost-plus contractor performing services at the Nevada Atomic Energy Commission test site, was a party to separate collective bargaining agreements with several unions, including petitioners (Pet. App. 1–2). All of these collective bargaining agreements established broad grievance and arbitration procedures for the resolution of disputes, including all disputes over the interpretation or application of the agreements (Pet. App. 10–11). In December 1962 and in March 1963 respondent, at the Atomic Energy Commission's direction, changed the place at which certain employees were to report to work—a change which affected the pay of those employees and eliminated transportation which respondent previously had furnished them (Pet. App. 4–5).

The unions contended that this change violated the collective bargaining agreements (Pet. App. 5).

The facts concerning this change are as follows: Respondent's employees working at the Nevada test site either live away from the site and travel every day to and from it, or utilize lodging and board facilities at so-called "campsites" located on the site (Pet. App. 4).[3] The employees have reported for work at various "reporting points" on the test site, and respondent has furnished transportation from such points to the jobsites where they work (Pet. App. 4). Employees receive "travel time pay" for the time during which they are transported from reporting points to jobsites (Pet. App. 4). The locations of these reporting points were not specified in the collective bargaining agreements; they were agreed upon in negotiations between the unions and respondent or were designated by respondent prior to particular jobs; and, in the past, the reporting points had normally coincided with campsites (Pet. App. 4).

One particular working area on the Nevada test site was known as "Area 400" or "NRDS" (Pet. App.

[3] Employees who travel every day to and from the site receive, in addition to their regular pay, a daily subsistence allowance, which, in the case of employees travelling significant distances, amounts to between $6.00 and $8.00 per day (Tr. 48–49, 115, 167, 172, 195, 294, 388, 521–523; Ex. 13, pp. 5–6; Ex. 29 T, pp. 31–32; Ex. 24, p. 14; Ex. 21, p. 38; Ex. 23, p. 25; Ex. 20, p. 5; Ex. 15, p. 30; Ex. 10, pp. 39–40). Thus, all employees receive, in addition to their regular pay, either daily subsistence pay or campsite accommodations (*ibid.*). The employees involved in this litigation travel to and from the test site and all receive subsistence pay (*ibid.*).

4). Prior to December 1962 in the case of some employees and March 1963 in the case of others, Area 400 was not a reporting point; employees working there reported at other places and respondent on its time reported them there (Pet. App. 4–5). Many of the employees working at Area 400, including all of those involved in the instant case, reported for work at a campsite known as Camp Mercury (Pet. App. 5). In December 1962 for some employees and March 1963 for others, respondent changed the reporting point for those employees to Area 400 itself, although there was no campsite there (Pet. App. 5). Respondent thereby ended its practice of paying those employees for the time spent travelling from Camp Mercury to Area 400 and of furnishing transportation between those points (Pet. App. 5).

The unions claimed that respondent's action in eliminating such travel time pay and transportation was a breach of the collective bargaining agreements, and that their members were entitled to these benefits even though the reporting point was changed (Pet. App. 5). Some of the unions initiated proceedings under the grievance and arbitration procedures of the collective bargaining agreements, but none of the petitioner unions exhausted these procedures and obtained an award (Pet. App. 16; Tr. 66, 131–132, 153, 185–186, 201, 662–663, 671–675, 752–759).[4] Respond-

[4] The only one of the unions involved in this litigation which the court below found had exhausted the arbitration procedures and obtained an award, was the Sheet Metal Workers International Association, Local Union 88 (Pet. App. 12–13). That Union is not a petitioner in this Court.

ent, on the other hand, insisted that its action was consistent with the collective bargaining agreements.[5]

In April 1963, the unions called a strike over respondent's refusal to provide the travel time pay and transportation (Pet. App. 2). Respondent then filed a state court suit to enjoin the strike, asserting that by striking instead of pursuing arbitration the unions violated the collective bargaining agreements (R. 4–5). The unions counterclaimed for a declaratory judgment that respondent was required to provide the travel time pay and transportation (Pet. App. 3).[6] Prior to the commencement of the trial, respondent dismissed its complaint, and the trial proceeded solely on the unions' counterclaim (Pet. App. 3; Tr. 4, 21–22). The trial court held for the unions.

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[5] Respondent's position was that the terms of the collective bargaining agreements, except for the agreement with the Sheet Metal Workers Union, showed that employees traveling daily to and from the test site and receiving daily subsistence allowances were not entitled to any travel time pay; that their pay began when they reported for work at a reporting point; and that these employees, not living at campsites but receiving a subsistence allowance instead, had no contractual right to have reporting points coincide with campsites. Respondent also claimed that even if the express terms of the contracts could be construed as granting the employees travel time pay and transportation from Camp Mercury to Area 400, it was an implied condition of the contracts that the AEC approve such practice. Finally, respondent asserted that all but four of the unions were estopped from claiming the travel time pay and transportation.

[6] In addition, the International Brotherhood of Teamsters, etc., Local Union 611, raised an issue about shift differential pay (different pay for different shifts worked) (Pet. App. 5–6). Since the Teamsters have not joined in the petition for certiorari, it is unnecessary to discuss this matter.

It ruled that their claim was not subject to the contractual grievance and arbitration procedures; that respondent had waived and repudiated arbitration; and that, under the contracts, the employees were entitled to travel time pay and transportation from Camp Mercury to Area 400 (R. 463–523).

The Supreme Court of Nevada reversed as to all unions except the Sheet Metal Workers. It held that since respondent was an employer in interstate commerce within the meaning of Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. 185(a), federal law controlled; that under the decisions of this Court, the grievance was subject to the contractual grievance and arbitration procedures; and that respondent had not waived or repudiated arbitration (Pet. App. 1–17). The court held that the Sheet Metal Workers Union had exhausted the arbitration procedures and obtained an award; that the counterclaim of that Union should be treated as an action to enforce the award; and that the award should be enforced (Pet. App. 11–13).

ARGUMENT

The decision of the Supreme Court of Nevada involves no novel question of federal law; it merely applies this Court's labor arbitration decisions to the particular facts of this case. Contrary to petitioners' assertion, this case does not present the issue "[w]hether a fundamental and long-lasting change in the relationship of the parties to a collective agreement prior to the demand for arbitration * * *

would release a party from his promise to arbitrate"; nor does it raise any questions concerning the propriety and/or constitutionality of the Atomic Energy Commission's directive to the respondent relating to travel time pay and transportation. Consequently, further review by this Court is not warranted.

1. Petitioners do not challenge the findings by the court below that the broad arbitration clauses of the collective bargaining agreements cover disputes over interpretation of the agreements; that the disputes over travel time pay and transportation involve interpretation of the agreements; that no language of the contracts specifically excludes these disputes from the arbitration provisions; that, therefore, the disputes were subject to arbitration; and that petitioners had failed to pursue arbitration (Pet. App. 8-15). The decisions of this Court make it clear that, in deciding whether in these circumstances a contract dispute is to be resolved through arbitration under the contract or by the courts, arbitration is to be employed. See, *e.g.*, *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593; *John Wiley & Sons* v. *Livingston*, 376 U.S. 543. The Nevada Supreme Court's further findings that respondent did not waive or repudiate arbitration (Pet. App. 15), that respondent was always willing to arbitrate the disputes (Pet. App. 16), and that it was the unions who were unwilling to arbitrate (Pet. App. 16), are fully supported by the evidence and

their correctness presents no legal question warranting resolution by this Court.[7]

2. Contrary to petitioners' contention this case does not present the question "[w]hether a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate"—a question which this Court found it unnecessary to decide in *Packinghouse Workers* v. *Needham*, 376 U.S. 247, 253, "since the undeveloped record before us reveals no such circumstance. Compare *Drake Bakeries, supra,* at 265." In *Packinghouse Workers,* as in

[7] After setting forth some of the facts, the court below stated (Pet. App. 16): "The evidence is uncontradicted that the employer willingly participated in every grievance procedure instituted and has steadfastly maintained throughout that the disputes be resolved as contractually agreed upon and not otherwise." Some of the testimony underlying this conclusion shows that when several unions asked respondent to waive arbitration, respondent refused and insisted upon arbitration (Tr. 120, 123–124, 662–665; Exs. D and 6); that respondent on several occasions specifically requested the unions to process the grievances in accordance with the contractual arbitration procedures (Tr. 33, 93, 131, 297–298, 757–758, 827; Exs. D and 6); that respondent's representatives at no time stated that they would not abide by an arbitration award in favor of the unions but took the position that respondent would comply with any valid arbitration awards rendered (Tr. 307, 421, 678); that respondent in fact participated in arbitration proceedings relating to the travel time pay and transportation to the extent that the unions initiated proceedings (Tr. 131, 237–242, 660–666, 720–724); and that when the unions obtained arbitration awards on other matters (*i.e.*, the amount of subsistence pay to which their members were entitled), respondent paid such awards (Tr. 217–220, 752–753; Ex. 7).

Drake Bakeries v. *Bakery Workers*, 370 U.S. 254, 265, the employer argued that a strike by the union prior to the union's demand for arbitration and allegedly in breach of the collective bargaining agreement released the employer from its obligation to arbitrate. In both cases, this Court held that under the facts the employer was not released from such obligation and the Court therefore left open the question whether in other circumstances a strike by the union would release the employer from its agreement to arbitrate.[8]

That question similarly is not presented here. The employer is not seeking to be released from its promise to arbitrate because of the unions' strike; instead, it is insisting on arbitration. The respondent engaged in no comparable conduct, such as a lock-out, which arguably could relieve the unions from their promises

[8] Thus, the Court in *Drake Bakeries*, *supra*, 370 U.S. at 265–266, stated:

> A strike in violation of contract is not *per se* an unfair labor practice and there is no suggestion in this record that the one-day strike involved here was of that nature. We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union. We do decide and hold that Article V of this contract obligates the company to arbitrate its claims for damages from forbidden strikes by the union and that there are no circumstances in this record which justify relieving the company of its duty to arbitrate the consequences of this one-day strike, intertwined as it is with the union's denials that there was any strike or any breach of contract at all.

to arbitrate. Respondent did nothing prior to seeking arbitration that made such a fundamental change in the relationship of the parties that the unions might be relieved of their promise to arbitrate.[9]

3. There is no merit to petitioners' contention that the Atomic Energy Commission's directive to respondent that the government would no longer reimburse it for sums expended in providing travel time pay and transportation from Camp Mercury to Area 400, unconstitutionally or unlawfully "adversely affected the rights of the petitioners under their collective bargaining agreements" or caused "a modification of a collective bargaining agreement" (Pet. 8). Petition-

[9] Petitioners do not specify the conduct of respondent upon which they rely as creating a fundamental change in the relationship of the parties. If petitioners are referring to the alleged unwillingness of respondent to arbitrate or abide by arbitration awards, which was the basis for their waiver argument in the court below, the Nevada Supreme Court found that the facts were otherwise. If petitioners are relying upon the fact that respondent's change of reporting points resulted from the directive of the Atomic Energy Commission that the government would not reimburse respondent for sums it expended in paying travel time pay from Camp Mercury to Area 400, this made no change in the parties' relationship. During the entire period of work on the Nevada test site, respondent was a government cost-plus contractor, and the government had control over the sums it would pay respondent under the contract. Moreover, the rights and liabilities between petitioners and respondent were not dependent upon the respondent's compensation under the cost-plus contract. Finally, if petitioners are maintaining that the change in reporting points with the consequential change in pay was a fundamental change in the relationship of the parties, this is the very issue to be arbitrated. Respondent contends that its action was consistent with the contracts and previous practice, whereby the employer designated reporting points.

ers' argument assumes that their rights under the collective bargaining agreements were adversely affected; but this is the very issue to be arbitrated. Cf. *Steelworkers* v. *Enterprise Corp., supra,* 363 U.S. at 598–599. Furthermore, the argument incorrectly presumes that respondent's legal basis for rejecting petitioners' demands was the Atomic Energy Commission directive rather than respondent's interpretation of the collective bargaining agreements. Although the directive prompted the respondent to change reporting points, the respondent has never contended that the Commission's determination could justify a departure from the collective bargaining agreements. Rather, respondent's position is that the collective bargaining agreements expressly or impliedly permit the change of reporting points, with its accompanying effect upon travel time pay and furnished transportation.

In sum, the constitutionality or propriety of the Atomic Energy Commission's directive to respondent is not an issue in this litigation. If the arbitrators ultimately should determine that respondent breached its collective bargaining agreements with petitioners, and that under those agreements the employees are entitled to the travel time pay and transportation, such arbitration awards will be judicially enforceable irrespective of the propriety of the Atomic Energy Commission' directive. This is illustrated by the circumstances of the claim of the Sheet Metal Workers Union. The court below held that that Union alone had pursued arbitration and obtained an award; and,

without consideration of the propriety of the Atomic Energy Commission's determination, it ordered the award enforced. The Commission has advised us that the award to the Sheet Metal Workers has been paid. Thus, the rights of the unions are in no way governed by or dependent upon the propriety of the Commission's directive to its cost-plus contractor. Instead, those rights are dependent upon the meaning of the collective bargaining contracts, and the parties have agreed that arbitrators should construe those contracts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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